

This matter was appealed to the Kansas Court of Appeals from the March 30, 1999, decision of the Workers Compensation Board. The Court of Appeals was asked to decide the admissibility of a court-ordered independent health care provider's opinions as to the cause of an injury pursuant to K.S.A. 1996 Supp. 44-510e, absent that health care provider's testimony. The Court of Appeals refused to resolve that issue, finding it would require factual speculation on its part. The matter was remanded to the Board regarding whether the Administrative Law Judge in this instance had requested a specific opinion on causality and, if so, whether that independent expert's opinion concerning causality may be considered without his testimony.

K.S.A. 1996 Supp. 44-510e(a) states in part:

If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination.

Here, an order was issued by the Administrative Law Judge on October 13, 1997, directing Lowry Jones, Jr., M.D., to examine claimant pursuant to K.S.A. 44-510e. The order states in pertinent part:

In the absence of an agreement between the claimant and the respondent-insurance carrier relative to the claimant's functional impairment as the result of an accidental injury that occurred, Lowry Jones, Jr., M.D., is selected to examine the claimant pursuant to K.S.A. 44-510e.

The independent medical examination report of Dr. Jones was issued December 10, 1997. In that report, Dr. Jones prefaced his opinion with the following:

Dear Honorable Judge Sample:

As per your order pursuant to K.S.A. 44-501E [sic], Barbara Shehane was examined in my office for the purpose of evaluation and determination of impairment ratings regarding a work related injury dated February 4, 1997.

Dr. Jones then went on in the report to explain the mechanics of claimant's injury as well as the functional impairment resulting to both claimant's left ankle and right elbow.

Also contained in the record were the medical reports and testimony of Thomas Joseph McCormack, M.D., claimant's treating physician. Dr. McCormack opined that claimant suffered no functional impairment to the left ankle. He also stated that the epicondylitis diagnosed by Dr. Jones was not related to claimant's accidental injury as the pain complained of by claimant in 1997 was in the proximal forearm musculature and not in the lateral epicondyle. Therefore, Dr. McCormack opined that claimant had no functional impairment as a result of the original right arm injury on February 4, 1997.

The Kansas Court of Appeals, in considering this issue, cited Sims v. Frito Lay, Inc., 23 Kan. App. 2d 591, 933 P.2d 161 (1997). In Sims, the Court was asked whether an administrative law judge could consider that portion of an independent medical examiner's report which went beyond an evaluation of functional impairment where there was no supporting testimony by the independent medical examiner.

The Court of Appeals here, in quoting the Sims court, noted:

. . . the plain language of K.S.A. 44-501e(a) does not allow for an administrative law judge to routinely consider an independent health care provider's opinion on issues beyond that of functional impairment without supporting testimony. Id. at 593.

However, this Court of Appeals panel also noted that the Sims court went on to state:

Like the Board, we express no opinion as to whether the administrative law judge, pursuant to K.S.A. 44-510e(a), may specifically request an independent health provider to state an opinion on matters beyond functional impairment and consider that opinion without the supporting testimony of the independent health care provider. Id. at 593.

The Appeals Board notes the Order of the Administrative Law Judge in this matter does, at least by implication, request Dr. Jones render an opinion regarding causation. The Order directs the functional impairment be "as the result of an accidental injury that occurred." Dr. Jones' report of December 10, 1997, then relates his opinion to claimant's "work related injury dated February 4, 1997."

The Appeals Board must consider the propriety of an administrative law judge requesting a causational opinion, along with a functional impairment opinion under K.S.A. 1996 Supp. 44-510e(a). The Board notes that the Court of Appeals refused to allow a Fund opinion in Sims. However, the facts in Sims vary from this case. In Sims, the administrative law judge referred the claimant to Dr. Bieri for an independent medical examination as to that claimant's functional impairment. Once the doctor had rendered his opinion, a party, rather than the administrative law judge, made inquiry of the doctor regarding issues extraneous to those the administrative law judge required the doctor to address. Specifically, the party asked the doctor for an opinion regarding the liability of the Kansas Workers Compensation Fund. The Court of Appeals in Sims, citing the Board's Sims ruling, stated:

Once the parties, [not the Fund], rather than the Administrative Law Judge, made inquiry of the doctor regarding issues extraneous to those the Administrative Law Judge desired the doctor to address, Dr. Bieri's function

changed from that of providing an independent medical evaluation for the Administrative Law Judge to that of providing expert witness testimony for one or more of the parties.

Both the Board and the Court of Appeals in Sims ruled the functional impairment opinion of Dr. Bieri was admissible, but the Fund liability opinion rendered by Dr. Bieri was not.

K.S.A. 1996 Supp. 44-510e allows the administrative law judge to consider the opinion of an independent medical examiner without the necessity of that examiner's testimony when dealing with a claimant's functional impairment. Implicit in the request by the administrative law judge, for an opinion regarding claimant's functional impairment, is the requirement that that functional impairment, in some way, be connected to the accidental injury suffered by the claimant. To do otherwise would render the administrative law judge's referral useless.

The Appeals Board acknowledges K.S.A. 44-519 prohibits the consideration of a health care examiner's report absent the testimony of such health care examiner. However, as held in Sims, *supra*, and McKinney v. General Motors Corp., 22 Kan. App. 2d 768, 921 P.2d 257 (1996), a narrow exception to the general rule of K.S.A. 44-519 has been created in K.S.A. 1996 Supp. 44-510e.

The Appeals Board finds that, within his October 13, 1997, Order, the Administrative Law Judge requested a causation opinion from Dr. Jones during the independent medical examination of December 10, 1997. Such opinion, pursuant to K.S.A. 1996 Supp. 44-510e, is found to be admissible even absent the doctor's testimony and is not prohibited by K.S.A. 44-519.

The Appeals Board further adopts the opinion of Dr. Jones regarding claimant's functional impairment, finding claimant has sustained a 10 percent whole body impairment as a result of the February 4, 1997, slip and fall.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Julie A. N. Sample dated July 10, 1998, granting claimant a 10 percent whole body functional impairment, should be, and is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2000.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

**DISSENT**

The undersigned respectfully dissents from the opinion of the majority in that the causation opinion of Dr. Jones should be allowed into evidence as it contravenes K.S.A. 44-519.

The majority, in the above opinion, has allowed an administrative law judge to circumvent a specific statute. K.S.A. 44-519 is clear in its prohibition of any report of a health care provider being allowed into evidence absent the testimony of that health care provider. While the undersigned acknowledges a certain exception has been created by the legislature in K.S.A. 44-510e, that exception should be narrowly construed, rather than expanded as has occurred in this case. When a statute is plain and unambiguous as is K.S.A. 44-519, the court must give effect to the legislative intent as expressed, rather than determining what the law should or should not be. Martindale v. Tenny, 250 Kan. 621, 829 P.2d 561 (1992).

Additionally, Dr. McCormack, the treating physician, expressed a definite opinion regarding what, if any, functional impairment claimant had as a result of the February 4, 1997, accident. The opinion of the treating physician should carry more weight than that of an independent medical examining doctor, especially where claimant's condition, as diagnosed by the independent medical examining doctor, differs from that for which the claimant was treated.

This Board member would allow the report of Dr. Jones to be considered only for the limited purpose of claimant's functional impairment opinion. The medical opinion of Dr. Jones should not be allowed to outweigh the causation opinion of Dr. McCormack.

In workers' compensation litigation, it is claimant's burden to prove by a preponderance of the credible evidence that his or her position is more probably true than not true based upon the entire record. K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g). In this instance, the opinion of Dr. McCormack, the treater, should carry more weight than that of the independent medical examiner, and claimant should be denied a permanent disability award.

---

**BOARD MEMBER**

c: Mark E. Kelly, Liberty, MO  
John David Jurcyk, Lenexa, KS  
Julie A. N. Sample, Administrative Law Judge  
Philip S. Harness, Director